

# “Human Rights, Responsibilities, and Democracy,” Sikkink Comments on Tasioulas and Moyn Papers: “Symposium on the Future of International Human Rights Law”

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## ABSTRACT

*It is a pleasure and a challenge to comment on these two very different Articles, “Saving Human Rights from Human Rights Law,” by John Tasioulas, and “On Human Rights and Majority Politics: Felix Frankfurter’s Democratic Theory,” by Samuel Moyn.<sup>1</sup> Both are rich, complex, and thought-provoking. To the degree they share any common dimension, it would be their skepticism toward human rights law, and in particular toward the judicialization of human rights law. But the skepticism comes from quite different directions and from their different disciplines. In the case of Tasioulas’s paper, the skepticism derives from his belief that legal human rights have gone beyond the realm of moral human rights, and thus he critiques unjustified legalization and judicialization of human rights. Moyn focuses on US constitutional law to argue that courts should exercise more deference with regard to the laws and policies decided upon by democratic majorities. In Tasioulas’s case, human rights law is contrasted with morality and found wanting, and in Moyn’s case, human rights law is contrasted with democracy and found wanting.*

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1. John Tasioulas, *Saving Human Rights from Human Rights Law*, 52 VAND. J. TRANSNAT’L L. 1167, 1173 (2019); Samuel Moyn, *Human Rights and Majority Politics*, 52 VAND. J. TRANSNAT’L L. 1135, 1137–40 (2019) [hereinafter Moyn, *Majority Politics*].

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The approach of this Article is different: unlike Tasioulas and Moyn's Articles, this Article is not skeptical about human rights law. The 2017 book, *Evidence for Hope: Making Human Rights Work in the 21st Century*, offered an evidence-based evaluation and defense of the legitimacy and effectiveness of international human rights law, institutions, and movements.<sup>2</sup> The book confronted a series of critiques that were unsubstantiated historically and empirically, including some arguments in the earlier work of Samuel Moyn.<sup>3</sup> But the content of that book will not be rehearsed here. These particular Articles offer a more nuanced and interesting critique of human rights law that in a few ways coincide with some of this author's own concerns and recommendations, as elaborated in this author's forthcoming book, *The Hidden Face of Rights: Towards an Ethic of Responsibility*.<sup>4</sup>

## I. MORALITY VS. LAW?

Tasioulas wants to "sav[e] human rights from the way in which they have been distorted by human rights law that has transgressed its proper bounds."<sup>5</sup> In particular, he wants to save law by "bringing it into greater alignment with . . . human rights morality."<sup>6</sup> For Tasioulas, the role of human rights law is to "give effect to universal moral rights."<sup>7</sup> He argues that people have an intuitive sense of moral

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2. See generally KATHRYN SIKKINK, EVIDENCE FOR HOPE: MAKING HUMAN RIGHTS WORK IN THE 21ST CENTURY (Princeton Univ. Press 2017) (defending the efficacy of human rights law and institutions using empirical research and fieldwork from throughout the 20th Century).

3. Compare *id.* at 20–38, 126–29, 196–200, 235–42 (defending the expansion of human rights law and institutions), with SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 220 (Harv. Univ. Press 2010) (arguing that the expansion of human rights law has changed fundamental issues of inequality) [hereinafter MOYN, THE LAST UTOPIA], and SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (Harv. Univ. Press 2018) (reiterating the argument that the expansion of human rights law is related to inequality) [hereinafter MOYN, NOT ENOUGH].

4. See generally KATHRYN SIKKINK, THE HIDDEN FACE OF RIGHTS: TOWARDS A POLITICS OF RESPONSIBILITIES (forthcoming Jan. 2020); accord Fernando Berdion Del Valle & Kathryn Sikkink, (Re)Discovering Duties: Individual Responsibilities in the Age of Rights, 26 MINN. J. INT'L L. 189, 189 (2017).

5. Tasioulas, *supra* note 1, at 1173.

6. *Id.*

7. *Id.* at 1175.

rights, and that these rights should not be confused with interests and values.<sup>8</sup> One way to distinguish moral rights from such interests and values that Tasioulas stresses here is that moral rights are associated with obligations—not just obligations of states but obligations for all.<sup>9</sup> These obligations are categorial: they cannot be ignored or denied or traded off.<sup>10</sup> But in Tasioulas's view, human rights law has strayed beyond the range of these rights involving obligations, and this in turn leads to human rights inflation.<sup>11</sup>

Not all good things in the world should be called human rights, and not all human rights should be judicialized. There are some important universal moral underpinnings to current international human rights law that should not be ignored. One of the main arguments in *Evidence for Hope* was that the origins of international human rights law were far more diverse than is often understood, deriving not only from the Global North, but importantly as well from countries and movements in the Global South.<sup>12</sup> Such diverse and widespread origins and support for international human rights law point to a deeper moral basis for the law shared by many cultures.

The comments here, however, will mainly address Tasioulas's belief that not all good things in the world should be turned into human rights law.<sup>13</sup> This author, in a forthcoming book, has made a related argument with regard to some issues, such as the environment.<sup>14</sup> Some progressive writers and activists are so focused on rights that they bend over backwards to frame all environmental issues as rights claims. For example, environmental activists have increasingly started to speak in terms of rights: the right to a clean environment, the rights of trees, the rights of rivers, or the rights of Mother Earth herself, as reflected in the Pachamama laws of Bolivia and Ecuador.<sup>15</sup> An environmental group has brought a lawsuit to give the Colorado River

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8. See *id.* at 1178–80.

9. See *id.* at 1179–80.

10. See *id.* at 1180.

11. See *id.* at 1181.

12. See SIKKINK, *supra* note 2, at 55–139 (documenting the many contributions that countries in the Global South made to the developments of international human rights law); see also STEPHEN JENSEN, *THE MAKING OF INTERNATIONAL HUMAN RIGHTS: THE 1960S, DECOLONIZATION, AND THE RECONSTRUCTION OF GLOBAL VALUES 1* (Cambridge Univ. Press 2016).

13. See Tasioulas, *supra* note 1, at 1173–74.

14. See SIKKINK, *supra* note 4, at 53–66; accord Del Valle & Sikkink, *supra* note 4, at 243–45.

15. See, e.g., Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 453–55 (1972); see also Cletus Gregor Barié, *Nuevas Narrativas Constitucionales en Bolivia y Ecuador: El Buen Vivir y Los Derechos de La Naturaleza*, 59 LATINOAMÉRICA: REV. DE ESTUDIOS LATINOAMERICANOS 9, 9–40 (2014).

legal rights.<sup>16</sup> If it succeeds, that river will join a small handful of others, such as the Ganges, that have legal rights.<sup>17</sup> There is nothing wrong with the idea of rivers, trees, or even Mother Earth having rights, but it is even more important to stress the responsibilities of countries, corporations, states and municipalities, organizations, and individuals to protect them.

Climate change is one of the most pressing issues of our age, but it is not an issue where the framing in terms of human rights is particularly helpful.<sup>18</sup> Instead, it should be framed primarily in terms of forward-looking responsibilities of the kind discussed by Iris Marion Young in her book *Responsibility for Justice*.<sup>19</sup> The most common legal meaning of responsibility focuses on who is accountable or liable.<sup>20</sup> But both the ordinary language meaning of responsibility and the philosophical discussion of responsibility are far richer and more nuanced than the legal model, what Iris Young called “backward-looking responsibility” or the “liability model of responsibility.”<sup>21</sup> Forward-looking responsibilities are held by states and corporations as well as by nonstate institutions and by individuals, who are not necessarily liable or to blame for a common human rights problem but can nevertheless help address it.<sup>22</sup> This type of responsibility asks not

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16. Marianne Goodland, *Lawsuit: Give the Colorado River the Same Rights as People, Corporations*, COLO. SPRINGS GAZETTE (Sept. 26, 2017), [https://gazette.com/news/lawsuit-give-the-colorado-river-the-sames-rights-as-people/article\\_427a91f7-608e-5dc3-a7be-1af357bb2a2d.html](https://gazette.com/news/lawsuit-give-the-colorado-river-the-sames-rights-as-people/article_427a91f7-608e-5dc3-a7be-1af357bb2a2d.html) [https://perma.cc/5QGC-ZMQJ] (archived Sept. 1, 2019).

17. See Michael Safi, *Ganges and Yamuna Rivers Granted Same Legal Rights as Human Beings*, GUARDIAN, Mar. 21, 2017, <https://www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings> [https://perma.cc/6HBQ-YJQL] (archived Sept. 1, 2019) (noting a recent New Zealand court decision giving rights to two sacred rivers of the Maori people); see also Eleanor Ainge Roy, *New Zealand River Granted Same Legal Rights as Human Being*, GUARDIAN, Mar. 16, 2017, <https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being> [https://perma.cc/PA6W-28MT] (archived Sept. 1, 2019) (granting the same legal status as a person to a river) (the author thanks her brother-in-law, Richard Johnson, for calling this issue to her attention).

18. See, e.g., *Human Rights and Climate Change*, U.N. OFFICE OF THE HIGH COMM’R OF HUMAN RIGHTS, <https://www.ohchr.org/en/issues/hrandclimatechange/pages/hrclimatechangeindex.aspx> (last visited Sept. 1, 2019) [https://perma.cc/6LU3-SVND] (archived Sept. 1, 2019) (noting that climate change issues can indirectly affect human rights).

19. See IRIS M. YOUNG, *RESPONSIBILITY FOR JUSTICE* xv (Oxford Univ. Press 2011) (describing responsibility as a forward-looking concept).

20. See *id.* at 158 (noting that legal meaning of responsibility is usually restricted to a liability model).

21. See *id.* at 98 (defining “liability model of responsibility” as practices such as assigning responsibility under the law and in moral judgment that seek to identify liable parties for sanctioning or redress, and noting these practices are all “backward-looking”).

22. See *id.* at 109 (corporations may not be directly responsible for human rights problems but may be in a position to help solve them).

“who is to blame[?]” but “what should we do?”<sup>23</sup> It is aimed at accomplishing things effectively rather than punishing those who are at fault.<sup>24</sup> The forward-looking responsibilities discussed in *The Hidden Face of Rights* are not limited to those for climate change but are also necessary to promote a broad range of civil, political, economic, and social rights.<sup>25</sup> Climate change is a particularly clear and instructive example of an issue where a model focused only on rights and backward-looking responsibility is simply inadequate.<sup>26</sup>

The liability model is not helpful, in part because it is too late to only focus on who is to blame for climate change. Rather, we need to ask all groups socially connected to the problem of climate change and able to act to step up and do their share. Everyone connected to the structural injustice of climate change needs to exercise collective responsibilities.<sup>27</sup> In order to fulfill and enjoy rights, increased attention to responsibilities of diverse actors is needed.

In this sense, Tasioulas is correct that it is not sufficient to speak of legal rights and the corresponding legal liability, but that moral responsibilities must be considered.<sup>28</sup> But it is not necessary to “sav[e] human rights from human rights law.”<sup>29</sup> Rather, human rights law must be complemented with attention to ethical and political responsibilities. Existing human rights law is not the problem. But the implementation of human rights must be improved via reclaiming responsibility within the framework of both enhanced democracy and robust rights protections.

Human rights law does not and should not require that all human rights problems be judicialized. The rise of individual criminal accountability for a small number of core crimes and mass atrocity is both morally justifiable and empirically effective.<sup>30</sup> But that does not

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23. ONORA O'NEILL, *JUSTICE ACROSS BOUNDARIES: WHOSE OBLIGATIONS?* 1, 166-167 (Cambridge Univ. Press 2016).

24. MARK BLITZ, *DUTY BOUND: RESPONSIBILITY AND AMERICAN PUBLIC LIFE* 1 (2005).

25. See SIKKINK, *supra* note 4, at 6.

26. See, e.g., Augustin Fagnière, *Climate Change and Individual Duties*, 7 WILEY INTERDISC. REV.: CLIMATE CHANGE 798 (2016) (critically examining human rights developments through the lens of climate change); see also SIKKINK, *supra* note 4, at 12.

27. See YOUNG, *supra* note 19, at 95 (proposing a “social connection model” of responsibility).

28. See Tasioulas, *supra* note 1, at 1175.

29. *Id.*

30. See KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* 100 (2011) (describing the conceptual change from holding state accountable to holding individuals accountable); Hunjoon Kim & Kathryn Sikkink, *Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries*, 54 INT'L STUD. Q., 939, 942 (2010) (describing moving from holding state accountable to holding individuals accountable); see also Hyeran Jo & Beth A. Simmons, *Can the International Criminal Court Deter Atrocity?*, 70 INT'L ORG. 443, 468-70 (2016).

mean that all human rights should be subject to this kind of judicialization. Because of this, the discussions of judicialization in both these papers should have been more specific about the types of rights and the types of judicialization being discussed.

Moyn also speaks of human rights and judicialization, but he does not distinguish between the judicialization of constitutional rights, the main topic of his Article, and the international judicialization of human rights, nor between state accountability and individual criminal accountability.<sup>31</sup> These are complex issues, the judicialization of constitutional rights is quite different from the judicialization of international human rights. And it is very possible that one form of judicialization is useful and other forms are less so. The most far-reaching judicialization of rights at the international level has been with regard to core crimes and mass atrocity, via the International Criminal Court (ICC).<sup>32</sup> This is exactly the area where international judicialization is appropriate and necessary.

Tasioulas follows a line of philosophical reasoning that is more interested in moral rights and obligations than legal ones.<sup>33</sup> Many other legal and philosophical writers have stressed the importance of responsibilities and obligations in debates over human rights.<sup>34</sup> Many philosophers share Tasioulas's understanding of moral rights as rights that are associated with obligations, not just obligations of states but of other nonstate actors as well. In his classic 1996 book, *Basic Rights*,

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31. See NEAL TATE & TORBJORN VALLINDER, *The Global Expansion of Judicial Power: The Judicialization of Politics*, in THE GLOBAL EXPANSION OF JUDICIAL POWER 1, 1–11 (1995) (describing the types of judicialization); SIKKINK, *supra* note 30, at 14–18 (noting a distinction between state accountability and individual criminal accountability).

32. See CARSTEN STAHN, *Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference?*, in THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 245 (2015) (noting that ICC jurisdiction is usually limited to the most egregious offenses); STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 6, 211–12 (2d ed. 2001) (noting that ICC jurisdiction is usually limited to human rights crimes and mass atrocities).

33. See Tasioulas, *supra* note 1, at 1169, 1178 (arguing that human rights law has strayed from its formative purpose in the Formative Aim These, which gives effect to the underlying morality of human rights).

34. See, e.g., WILLIAM F. FELICE, THE ETHICS OF INTERDEPENDENCE: GLOBAL HUMAN RIGHTS AND DUTIES (2016); Eric R. Boot, *Human Duties and the Limits of Human Rights Discourse*, in STUDIES IN GLOBAL JUSTICE 17 (Deen K. Chatterjee ed., 2017); Makau W. Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT'L L. 339, 340 (1995); Jeremy Waldron, *Dignity, Rights, and Responsibilities*, 43 ARIZ. ST. L.J. 1107, 1107 (2011). See also STEPHAN PARMENTIER ET AL., BETWEEN RIGHTS AND RESPONSIBILITIES: A FUNDAMENTAL DEBATE (2016); Julio Montero, *Human Rights, Personal Responsibility, and Human Dignity: What Are Our Moral Duties to Promote the Universal Realization of Human Rights?*, 18 HUM. RTS. REV., 67, 70 (2017); Samuel Moyn, *Rights vs. Duties: Reclaiming Civic Balance*, BOS. REV. (May 16, 2016), <http://bostonreview.net/books-ideas/samuel-moyn-rights-duties> [<https://perma.cc/E95G-K7HX>] (archived Sept. 1, 2019).

for example, Henry Shue elaborates the various types of moral duties of all actors that are necessary to contribute to the enjoyment of rights.<sup>35</sup> Charles Beitz speaks of the “demand side” of human rights and also the “supply side,” by which he means “the reasons why some class of agents should regard themselves as under an obligation to respect or enforce the human rights of others.”<sup>36</sup> He distinguishes between the “first-level” responsibilities of states with the primary duty to respect and protect rights and the “second-level” responsibilities of other agents, who may need to act when governments cannot or will not perform their responsibility.<sup>37</sup> Mathias Risse understands human rights as “rights that are accompanied by responsibilities at the global level,” but he recognizes that duties across borders are “notoriously underspecified.”<sup>38</sup> He argues, borrowing Beitz’s categories, that his own approach to human rights is supply-side focused, making global responsibilities central.<sup>39</sup> Thomas Pogge has drawn attention to the duties of individuals, arguing that citizens of wealthy countries are implicated in global injustice through their active or passive support of oppressive political regimes.<sup>40</sup> Pogge recognizes that citizens of industrialized nations have negative duties not to impose unjust systems on the world’s poor.<sup>41</sup>

Despite the arguments offered by philosophers like Tasioulas, however, both the law and the practical politics of rights continue to be demand-side focused; to the degree that they look at the supply side, they have focused almost entirely on state duties.<sup>42</sup> It is not enough to provide philosophical justifications; the political and normative barriers to further discussion of nonstate responsibilities in relation to rights must be confronted. Two Belgian philosophers, for example, say

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35. See HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 52–53 (2d ed., Princeton Univ. Press 1996) (arguing that fundamental rights impose corresponding duties on actors); see also Barbara Frey, *A Review of a Classic Book: Henry Shue, Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 2 *BUS. & HUM. RTS. J.* 189, 189–94 (2017) (stressing Shue’s attention to duties and their relevance to business and human rights issues today).

36. CHARLES R. BEITZ, *THE IDEA OF HUMAN RIGHTS* 1, 59 (Oxford Univ. Press 2011).

37. *Id.* at 106–09.

38. MATHIAS RISSE, *ON GLOBAL JUSTICE* 177, 191 (Princeton Univ. Press 2012).

39. *Id.* at 177.

40. See THOMAS W. POGGE, *WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS* 1, 162 (2d ed., Polity 2008) (2002) (arguing that wealthy countries often passively support oppressive political regimes that participate in human rights violations).

41. See *id.* at 172.

42. See Ben Saul, *In the Shadow of Human Rights: Human Duties, Obligations, and Responsibilities*, 32 *COLUM. HUM. RTS. L. REV.* 565, 567–69 (2001) (noting the decline of civic responsibility, the feeling of entitlement to government services, and discussion of what the government should do for its citizens); Boot, *supra* note 34, at 35 (arguing that state responsibilities are prioritized over those of the individual).

that responsibilities are often treated as if they were the “hidden and shameful face” of human rights.<sup>43</sup>

Philosophically, this Article takes a pragmatic or practical approach to human rights along the lines outlined by Charles Beitz—that is, existing human rights law is a good place to begin for moral inquiry, because the multiple decisions of many individuals representing many states around the world seem a better ethical starting place than to substitute one’s own normative criteria.<sup>44</sup> Tasioulas’s attempts to distinguish which human rights listed in the UDHR are not really human rights appear futile, but his call for more scrutiny or skepticism with regard to efforts under way to formulate or draft new rights is well taken.<sup>45</sup>

Although it is possible that not all good things are rights and that human rights need to be accompanied by ethical and political obligations, it is concerning that Tasioulas’s work here might be classed together with other authors who embrace responsibilities mainly to challenge rights, arguing that rights should be subject to limits and that these limits are defined by responsibilities.<sup>46</sup> Tasioulas is not the first to claim that “rights talk” sometimes stimulates the proliferation of questionable “rights,” such as the right to peace or international solidarity.<sup>47</sup> States sometimes deny rights to individuals on the basis of their failure to perform certain duties. This Article rejects the idea that rights and obligations should exist in some kind of legal conditional relationship that allows rights to be taken away if one does not comply with some responsibility. Humans have rights by virtue of being human, and they are not conditional on the performance of duties.

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43. Francois Ost & Sebastien van Drooghenbroeck, *La Responsabilidad Como Cara Oculta de los Derechos Humanos*, 5 ANUARIO DE DERECHOS HUMANOS, NUEVA ÉPOCA 785, 796 (2004).

44. See BEITZ, *supra* note 36, at xii (arguing that states’ existing human rights law contains less inherent biases than normative judgements about rights).

45. See Tasioulas, *supra* note 1, at 1176 (arguing that some rights enumerated in the Universal Declaration of Human Rights are not human rights at all).

46. See, e.g., Boot, *supra* note 34 (arguing that human rights should be limited to state responsibilities).

47. Tasioulas, *supra* note 1, at 1206 (arguing that overarching normative discussions of human rights law conflates rights with interests); see also MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 14 (Free Press 1991) (noting that “rights talk” can lead to disparaging notions of freedom); Jacob Mchangama & Guglielmo Verdirame, *The Danger of Human Rights Proliferation*, FOREIGN AFF. (July 24, 2013), <https://www.foreignaffairs.com/articles/europe/2013-07-24/danger-human-rights-proliferation> [<https://perma.cc/S3Y8-KHP7>] (archived Sept. 30, 2017) (states can hide behind the use of human rights law to attack some rights); Boot, *supra* note 34, at 177 (arguing that rights discussions uncoupled from duties stimulate perverse notions of freedom).

## II. RIGHTS VS. DEMOCRACY?

Moyn's Article makes a series of very different arguments than Tasioulas's Article. Human rights are again questioned, but this time in relation to democracy and the demands of majorities in democratic countries.<sup>48</sup> Moyn raises a plausible and engaging debate at the heart of rights, and is to be commended for drawing our attention to this issue, and to the interesting illustrations from Roosevelt and Justice Frankfurter.<sup>49</sup>

First, Moyn's use of the term "human rights" throughout his Article was surprising.<sup>50</sup> After expending considerable ink in his book *The Last Utopia* to convince readers that human rights emerged in the 1970s, and *not* in the 1930s, in his Article Moyn makes an almost casual use of the term human rights in the context of US constitutional law in the 1930s.<sup>51</sup> Does this signal that he no longer believes that human rights began in the 1970s? If so, a brief recognition of the difference between his treatment of the term here and in *The Last Utopia* would be welcome.<sup>52</sup> Or is it simply useful now to use human rights in the context of the 1930s, to support the argument that human rights are used to shield "elite power from popular incursion"?<sup>53</sup> But in the United States during this period, the term human rights was not being used with any regularity.<sup>54</sup> Moyn is talking about US constitutional rights here, not human rights, and that should be taken into account by the reader.<sup>55</sup> Tasioulas, for example, clearly stresses the difference between human rights and constitutional rights, or what

48. See Tasioulas, *supra* note 1, at 1201–02 (arguing previous notions that rights protect minorities from majorities may be misguided).

49. See Moyn, *Majority Politics*, *supra* note 1, at 1136–38 (examining the reconciliation of human rights with majority politics through US President Roosevelt and Justice Frankfurter).

50. See, e.g., *id.* (describing human rights throughout).

51. See MOYN, *THE LAST UTOPIA*, *supra* note 3, at 50 (noting that the modern concept of human rights emerged in the postcolonial period in the 1970s); Moyn, *Majority Politics*, *supra* note 1, at 1136 (arguing in Roosevelt's speech in honor of the Constitution in September 1937 hardly rejected human rights).

52. *Contra* MOYN, *THE LAST UTOPIA*, *supra* note 3. See, e.g., Steven L.B. Jensen, *The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values*, in *HUMAN RIGHTS IN HISTORY* (Stefan-Ludwig Hoffmann & Samuel Moyn eds., Cambridge Univ. Press 2016) (defending the idea that the international protection of human rights emerged in the 1940s and was given a boost after decolonization in the 1960s); SIKKINK, *supra* note 2, at 22–55 (noting that contrary to Moyn's assertion, human rights may have started in the 1940s).

53. Moyn, *Majority Politics*, *supra* note 1, at 1136.

54. This is supported by the Google Ngram of the words "human rights," using the Google Books Ngram viewer, which shows the use of the term almost flat in the 1930s. See <https://books.google.com/ngrams#> (last visited Sept. 20, 2019) [<https://perma.cc/YSL6-P54S>] (archived Sept. 20, 2019).

55. See Moyn, *Majority Politics*, *supra* note 1.

he calls rights people have by virtue of their membership in particular communities or citizenship rights.<sup>56</sup>

If Moyn is making an argument in the context of US constitutional law that he later hopes to apply to human rights judicialization in democracies in the world, careful use of the term human rights is all the more important. Modern constitutions in many parts of Latin America, as well as in other parts of the Global South, including South Africa and India, were written explicitly to include human rights language taken from international human rights law.<sup>57</sup> When human rights litigation around socioeconomic rights in Latin America, India, or South Africa, for example, is considered, it is indeed relevant to talk about human rights as embodied both in treaty obligations and incorporated into constitutional law.<sup>58</sup>

Respect for the decisions of democracy should be an integral part of any human rights perspective. Empirical research on human rights has shown that there is a strong correlation between democracy and high human rights performance.<sup>59</sup> Promoting and respecting democracy is something that all human rights activists should aspire to. Human rights law, institutions, and activism have been most important exactly in those countries that do not have democracies, and in the best of cases, have contributed toward transitions to democracy.<sup>60</sup>

One of the most important nonviolent means to protect human rights is to promote and support democracies. Multiple studies have found that democratic regimes are less likely to engage in repression than nondemocratic regimes.<sup>61</sup> Elections offer opportunities to remove

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56. Tasioulas, *supra* note 1, at 1191.

57. *See generally* Del Valle & Sikkink, *supra* note 4.

58. LAW AND SOCIETY IN LATIN AMERICA: A NEW MAP 7–10 (Cesar Rodriguez-Garavito ed., Routledge 2014). On developments in Latin America and other Global South countries, *see generally* LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY (Boaventura de Sousa Santos & Cesar Rodriguez-Garavito eds., 2005).

59. TODD LANDMAN, PROTECTING HUMAN RIGHTS: A COMPARATIVE STUDY 1, 7 (Geo. Univ. Press 2005); Steven C. Poe, C. Neal Tate & Linda Camp Keith, *Repression of the Human Right to Personal Integrity Revisited: A Global Cross-National Study Covering the Years 1976–1993*, 43 INT'L STUD. Q. 291, 296 (1999); Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RESOL. 925, 932–34 (2005).

60. *See* THOMAS RISSE, STEPHEN C. ROPP & KATHRYN SIKKINK, THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 66 (Cambridge Univ. Press 1999) (the role of human rights movements in contributing to transitions to democracy is addressed in many case chapters); BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (Cambridge Univ. Press 2009); SIKKINK, *supra* note 2, at 193–96 (discussing the links between democracy and development).

61. Poe, Tate & Keith, *supra* note 59.

authorities from office, thus raising the costs of repression.<sup>62</sup> Democratic institutions also provide established, nonviolent mechanisms to address grievances and reinforce values of deliberation and peaceful contestation.<sup>63</sup> While most agree that democratic political institutions generally reduce repressive behavior, it appears that democratic institutions mainly contribute to decreased repression after a certain high threshold is reached, and some institutions or configurations of a democratic regime have greater effects on repression levels than others.<sup>64</sup>

A semi-democracy is not enough to improve human rights. It takes a full-fledged democracy with high levels of participation, a system with electoral competition between multiple parties, and constraints on the use of executive power in order to discourage repression.<sup>65</sup> In other words, democracy is not secured by merely holding elections. Policies need to encourage high levels of citizen participation in politics, including but not limited to voting in elections.<sup>66</sup> There also needs to be multiple political parties that compete with one another in elections.<sup>67</sup> A single-party system is not able to create the genuine competition necessary for democracy.<sup>68</sup> Finally, the necessary rights to make both participation and competition meaningful need to be in place.<sup>69</sup> If the government threatens citizens for simply speaking their minds, for example—denying them freedom of speech—the conditions for serious elections are not in place.<sup>70</sup>

Among many governments, as well as among some scholars and activists, there continues to be some doubt about whether democracy is essential for human rights improvements. Some claim that to speak in favor of democracy is an ideological statement, maybe even a religious one.<sup>71</sup> But the many studies of the causes of human rights violations have made it abundantly clear that democracy is essential

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62. David Cingranelli & Mikhail Filippov, *Electoral Rules and Incentives to Protect Human Rights*, 72 J. POL. 243, 245–46 (2010).

63. Christian Davenport, *The Promise of Democratic Pacification: An Empirical Assessment*, 48 INT'L STUD. Q. 539, 539–40 (2004).

64. Bruce Bueno de Mesquita et al., *Thinking Inside the Box: A Closer Look at Democracy and Human Rights*, 49 INT'L STUD. Q. 439, 439 (2005); *id.* at 539.

65. Mesquita et al., *supra* note 64, at 439.

66. ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 1, 2–5 (Yale Univ. Press 1972).

67. *Id.*

68. *Id.*; Mesquita et al., *supra* note 64, at 439 (this understanding of democracy as multidimensional follows a long tradition in political science research on democracy).

69. DEMOCRACY IN DEVELOPING COUNTRIES: LATIN AMERICA 1, 25 (Larry Diamond et al. eds., 2d ed. 1999).

70. *Id.*

71. Maxwell O. Chibundu, *Political Ideology as a Religion: The Idolatry of Democracy*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 117, 121 (2006).

for human rights to succeed, but not sufficient.<sup>72</sup> Many democracies do not have robust human rights practices, but there are not any countries with robust human rights practices that are not democracies.<sup>73</sup>

Given that a strong democracy is a necessary but not a sufficient condition for full human rights protections, there are good reasons for courts to display some deference to some decisions of majorities in democracies. In this sense, Moyn calls attention to an important issue of the tension between the demands of rights and the decisions of majorities in democracies like the United States.<sup>74</sup> The European Court of Human Rights has long had a doctrine called the “margin of appreciation” doctrine that tries exactly to do this.<sup>75</sup> The term “doctrine of margin of appreciation” does not appear in the European Convention on Human Rights, but it is well established in the case law of the European Court.<sup>76</sup> The origins of the doctrine go back to 1958, the year before the European Court was established, in a decision of the European Commission about Article 15, in determining the existence of a public danger that might justify derogation from obligations.<sup>77</sup> But the court also determined that states “do not enjoy unlimited power in this respect.”<sup>78</sup> Later cases looked at freedom of expression explicitly within the confines of a democratic society.<sup>79</sup> In applying the doctrine, the court imposes self-restraint on its power of review, accepting that domestic authorities should have a certain autonomy in applying the convention.<sup>80</sup>

While the court may be giving the margin to domestic courts, not to democratic forces *per se*, it is quite suggestive that this doctrine emerged in the European Court exactly at a time when all of its members were democratic. A similar doctrine, for example, has not been used in the Inter-American Court of Human Rights (IACtHR), which emerged in a context of many authoritarian countries.<sup>81</sup> Essentially, the margin of appreciation might be seen as the deference that a regional court can give to its democratic state members, but that

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72. LANDMAN, *supra* note 59, at 7; Poe, Tate & Keith, *supra* note 59, at 296; Neumayer, *supra* note 59, at 950; *see also* RISSE, ROPP & SIKKINK, *supra* note 60.

73. SIKKINK, *supra* note 12, at 193–96.

74. *See* Moyn, *supra* note 49.

75. HUMAN RIGHTS BETWEEN LAW AND POLITICS: THE MARGIN OF APPRECIATION IN POST-NATIONAL CONTEXTS 1 (Peter Agha ed., Hart Publishing 2017).

76. Eva Brems, Margin of Appreciation Doctrine in the Case-law of the European Court of Human Rights (May 19, 1996) (unpublished Ph.D. dissertation, Harvard Law School) (on file with author).

77. Dean Spielmann, *Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review*, 14 CAMBRIDGE Y.B. EUR. LEGAL STUD. 381, 386 (2012).

78. *Id.* at 387.

79. *Id.*

80. *Id.* at 382.

81. Andreas Follesdal, *Exporting the Margin of Appreciation: Lessons for the Inter-American Court of Human Rights*, 15 INT'L J. CONST. L. 359, 361 (2017).

it might choose *not* to give to more authoritarian states.<sup>82</sup> Now that the European Court is dealing with more authoritarian members<sup>83</sup> and the IACtHR is having to deal with more democratic ones,<sup>84</sup> the IACtHR needs a margin of appreciation doctrine, and the European Court might consider how to be more cautious in its use of its doctrine.

Although democracy is necessary, it is not a sufficient condition for rights protections. Majorities historically have been quite willing to violate the rights of minorities, and without some countervailing processes, rights violations have been and can be quite serious, even in democracies.<sup>85</sup> This is exactly the reason why strong democracies are liberal or constitutional democracies, with rights enshrined in their constitutions.<sup>86</sup> Flagrant disregard for the rights of minorities can be addressed from within such democracies in multiple ways, such as by social movements, political parties, and by courts—and these are not mutually exclusive at all, as Moyn seems to suggest.<sup>87</sup> A careful analysis of movements for the rights of racial minorities as well as for women's rights in the United States would find that it was exactly the combination of social movement, litigation, and institutionalization, that was essential.<sup>88</sup> So, while democracies are entitled to a margin of appreciation, they should not be given a *carte blanche*, and it is up to a judicious judiciary to make that distinction.

Moyn's paper has a bit too much of dichotomous thinking, with democracy held up against courts and rights, instead of understanding that all strong democracies are constitutional democracies with rights protections built into their very structure.<sup>89</sup> Even so, there are of course important debates to be had about when courts, both domestic

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82. See, e.g., Jan Kratochvil, *The Inflation of the Margin of Appreciation by the European Court of Human Rights*, 29 NETH. Q. HUM. RTS. 324, 326–27 (2011).

83. Follesdal, *supra* note 81, at 360.

84. *Id.*

85. See, e.g., Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1300 (2012) (noting examples of violations of rights and liberties such as the Sedition Act of 1918, Lincoln's use of martial law during the Civil War, suspension of habeas corpus, Japanese Americans' internment during World War II, and antiterrorism measures in response to the 9/11 attacks).

86. See Fareed Zakaria, *The Rise of Illiberal Democracy*, FOREIGN AFF. (Nov. 1, 1997), <https://www.foreignaffairs.com/articles/1997-11-01/rise-illiberal-democracy> [<https://perma.cc/X4AL-PM7Y>] (archived Sept. 1, 2019).

87. See Moyn, *supra* note 49.

88. See, e.g., Mary Fainsod Katzenstein, *Stepsisters: Feminist Movement Activism in Different Institutional Spaces*, in THE SOCIAL MOVEMENT SOCIETY: CONTENTIOUS POLITICS FOR A NEW CENTURY 195–216 (David Meyer & Sidney Tarrow eds., Rowman & Littlefield Publishers 1998) (examining how feminism developed through social movements).

89. So, for example, every modern coding system for democracy, be it Freedom House, Polity IV, or V-dem include attention to basic civil and political rights as part of their definition of democracy. See, e.g., *Methodology: Freedom in the World 2016*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world-2016/methodology> (last visited Sept. 20, 2019) [<https://perma.cc/2WXC-XYL8>] (archived Sept. 1, 2019).

and international, should defer to majorities. But it is not persuasive, as Moyn quotes Frankfurter as saying, that when judicial guardians do not act for human rights, it is an opportunity to “powerfully help to bring the people and their representatives to a sense of their own responsibility.”<sup>90</sup> Or at least no good evidence has been shown that this is the case. Human rights tend to advance when both judicial actors and social movement actors are working together, not when the judicial branch refuses to act.

How might these Articles talk to one another? Tasioulas’s discussion of some of the cases of the South African Constitutional Court might be very relevant for Moyn’s thinking about Frankfurter and how courts can defer to democratic institutions.<sup>91</sup> Indeed at one point Moyn cites Frankfurter saying that he firmly believed that judges possessed no expertise in balancing rights against rights or other priorities “proportionally” or in some other way.<sup>92</sup> This echoes the language of the Treatment Action Campaign case, cited by Tasioulas, when the South African Constitutional Court says “Courts are ill-suited to adjudicate upon issues where a court order could have multiple social and economic consequences for the community.”<sup>93</sup> Here is another court thinking hard about ways in which “the judicial, legislative, and executive functions achieve appropriate constitutional balance.”<sup>94</sup> Likewise Tasioulas makes an interesting contrast between the South African Constitutional Court and Brazilian and Colombian courts, which take rather different positions, with different results.<sup>95</sup> Here Tasioulas draws on the research of his colleague, Octavio Ferraz, whose empirical research on Brazilian right to health cases shows that such cases might distort health spending in ways that are regressive in their effects.<sup>96</sup> While the plaintiffs in these cases are not necessarily the “wrong minorities” discussed by Moyn, their successful claims can have negative effects on equitable overall health spending.<sup>97</sup> In the very last pages of Tasioulas’s Article, there is a dialogue with the Moyn Article, when Tasioulas argues that courts should not assume the role

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90. Moyn, *Majority Politics*, *supra* note 1, at 1152 (citing *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 670 (1943)).

91. *See id.*; Tasioulas, *supra* note 1.

92. Moyn, *Majority Politics*, *supra* note 1, at 1156 (citing Jamal Greene, *Rights as Trumps?*, 132 HARV. L. REV. 28, 96 (2018)).

93. Tasioulas, *supra* note 1, at 1203.

94. *Id.*

95. *Id.* at 1203–05.

96. *See, e.g.*, Octavio Luiz Motta Ferraz, *Brazil: Health Inequalities, Rights, and Courts: The Social Impact of the Judicialization of Health*, in *LITIGATING HEALTH RIGHTS: CAN COURTS BRING MORE JUSTICE TO HEALTH?* 76–102 (Alicia Ely Yamin & Siri Gloppen eds., 2011) (arguing Brazil’s health litigation model produces a negative social impact where the most disadvantaged are not getting health benefits).

97. *See id.*

of retrospective lawmakers.<sup>98</sup> He and Moyn appear to agree that the legitimacy of law is compromised when not subject to robust democratic accountability, and that a human rights ethos will be sapped by having human rights matters systematically decided in court proceedings rather than as part of ordinary democratic policies.<sup>99</sup>

If Moyn intends to extend his Article to a more general modern human rights context, he should consider putting Frankfurter in dialog with, for example, South African Constitutional Court justices in their decision to the *Soobramoney v. Minister of Health, KwaZulu-Natal* case.<sup>100</sup> The South African Constitution provides for the “right to health,” including emergency treatment, and the South African Constitutional Court has been very attentive to human rights issues.<sup>101</sup> Nevertheless in this case, the justices decided not to order a hospital to provide kidney dialysis for a single litigant.<sup>102</sup>

Instead the justices deferred to “rational decisions taken in good faith by political organs.”<sup>103</sup>

The South African Constitutional Court wrote:

The provincial administration which is responsible for health services in KwaZulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.<sup>104</sup>

In other words, there are interesting and important decisions being made by courts in democracies like South Africa and India trying to grapple in sophisticated ways with exactly these complicated relations between democratic politics and human rights.<sup>105</sup> Moyn should consider these cases before he sets up another ill-considered dichotomy of democracy versus human rights.

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98. Tasioulas, *supra* note 1, at 1205.

99. See generally Tasioulas, *supra* note 1; Moyn, *Majority Politics*, *supra* note 1.

100. *Thiagraj Soobramoney v. Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) (S. Afr.).

101. CÉSAR RODRÍGUEZ-GARAVITO & DIANA RODRÍGUEZ-FRANCO, *RADICAL DEPRIVATION ON TRIAL: THE IMPACT OF JUDICIAL ACTIVISM ON SOCIOECONOMIC RIGHTS IN THE GLOBAL SOUTH* 1, 193 (Cambridge Univ. Press 2015).

102. See *Soobramoney*, *supra* note 100.

103. *Id.*

104. *Id.*

105. See, e.g., RODRÍGUEZ-GARAVITO & RODRÍGUEZ-FRANCO, *supra* note 101, at ix.

## III. CONCLUSION

These stimulating Articles remind us of the importance of restraint—restraint in the creation of new human rights law, and restraint or deference in judicial activism in both enforcing human rights law and constitutional law. In the age of rights, such calls for restraint and deference should be critically welcomed and debated. But a vision for the future of human rights calls for more than doctrines of restraint and deference. It calls for a positive agenda for change. In *The Hidden Face of Rights*, it is argued that such a positive agenda involves a greater commitment to implement human rights more effectively by embracing responsibilities.<sup>106</sup> It is not about responsibilities *rather than* rights, or about the responsibilities of nonstate actors *rather than* those of states. It is about the necessity of creating and articulating firmer norms and practices of networked responsibilities among diverse actors as necessary complements to human rights in order to realize those rights more fully.

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106. See SIKKINK, *supra* note 4.